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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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AMICUS CURIAE BRIEF OF THE NEW INSPIRATIONAL NETWORK IN SUPPORT OF APPELLANTS

JAMES S. BLITZ *
ROBERTS & ECKARD, P.C.
1919 Pennsylvania Avenue, N.W.
Suite 222
Washington, D.C. 20006
(202) 296-0533
Counsel for Amicus Curiae
* Counsel of Record

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INTEREST OF THE AMICUS CURIAE [1]

The Inspirational Network, Inc., is a not-for-profit corporation headquartered in Charlotte, North Carolina. It owns and operates The New Inspirational Network (both The Inspirational Network, Inc. and The New Inspirational Network are hereinafter referred to as "INSP"). INSP's programming, offered free of charge to cable operators, consists of a mixture of interfaith inspirational programs and family entertainment programs. Among the types of programs INSP offers its viewers are programs for children, variety programs, contemporary Christian music

[1] Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to the Supreme Court Rule

programs, and health and fitness programs. INSP makes a significant contribution to diversity in cable programming. Eighteen percent of INSP's programming comes from predominantly minority churches and INSP carries programs from various geographic areas of the country.

Since September 1990, INSP has devoted considerable resources to the development of INSP as a valuable contributor to the diverse, quality programming delivered to the nation's homes through cable television facilities. As part of this effort, INSP has built an $11 million state-of-the-art video and film production facility that is the largest such facility in the Southeast United States, acquired the rights to a broad range of programming for carriage on INSP, and hired a staff expected to reach 75 persons by the end of 1993. INSP's staff includes a team of seven Regional Managers of Affiliate Relations who work cooperatively with cable systems in all parts of the country in an effort to obtain widespread carriage for INSP.

As INSP will discuss further herein, the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act" or the "Act"), Pub. L. No. 102-385, §§ 4-5, 106 Stat. 1471-1481 (1993), restrict INSP's ability to present its programming over cable systems and limit cable operators' editorial discretion to determine whether to carry the signals of cable networks, such as INSP, rather than the signals of local broadcast stations. INSP accordingly submits this Brief to assist the Court in its resolution of this case.[2]

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[2] As *amicus curiae*, INSP's Brief addresses only those issues in which INSP's particular experiences and knowledge can be of assistance to the Court. Accordingly, INSP herein focuses on the particularly damaging effects that must carry rules have on developing cable networks such as The New Inspirational Network, while also addressing such issues as the standard by which the Court should evaluate the constitutionality of the must carry rules and why the Court should invalidate those rules.

INSP's Brief is expressly not addressing other issues that may be raised in this proceeding and that were raised in the court 37.3.

SUMMARY OF ARGUMENT

The must carry rules' impact on new and developing cable networks, such as INSP, is even more immediate and dramatic than their effect on more established cable programmers. Since must carry requirements compel cable systems to devote a large portion of their channel capacity to the carriage of local broadcast stations, systems are especially reluctant to carry the programming of a newer cable network having less established subscriber loyalty and a shorter operating history. A newer network's inability to obtain carriage due to must carry obligations may therefore preclude the network from ever having the opportunity to present its programming to the public in a meaningful manner.

The Act's must carry requirements should be evaluated and invalidated under the strict scrutiny standard, since must carry rules favor certain classes of speakers over others based on the content of speech. Proceeding from the erroneous assumption that the Act's must carry requirements were purely "economic regulation," the District Court misconstrued applicable precedent and minimized the inherent content-related nature of must carry requirements and the impermissible burden that such requirements place on the First Amendment rights of cable operators and cable programmers.

Even if the Act's must carry requirements are evaluated using the balancing test of *United States v. O'Brien*, 391 U.S. 367 (1968), the rules should be found unconstitutional on First Amendment grounds. There is no "substantial" government interest in reimposing must carry, since even the reasons that Congress expressed for adopting new must carry rules demonstrate that those rules are primarily protectionist in nature, protecting broadcasters at the expense of cable operators and cable programmers. Moreover, the significant number of television broadcast-

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below, such as the criteria for granting a preliminary injunction, declaring an act of Congress facially unconstitutional, standing, and granting summary judgment.

ers who recently chose to forego their must carry rights, opting instead to obtain carriage pursuant to negotiated "retransmission consent" agreements, proves that broadcasters have concluded that they do not need to rely on must carry rules to ensure carriage on cable systems and that such rules are not in fact needed to ensure their carriage. Furthermore, Congress' assertion that must carry rules are needed to ensure the availability of local news and information programming ignores many cable systems' provision of such programming to subscribers, through the programming efforts of the cable operator or other non-broadcast users of the cable system.

The Act's must carry requirements would also fall under the final prong of the *O'Brien* test, since numerous alternatives exist to reimposing must carry rules that would have more effectively, and less intrusively, served Congress' goals. Must carry has in fact frustrated Congress' goal of increasing competition by reducing the marketplace incentive for broadcasters to produce and carry quality programming. Rather than relying on must carry, Congress could have ensured diversity in cable programming by encouraging competition between broadcasters and cable programmers.

ARGUMENT

I. MUST CARRY RULES PARTICULARLY INHIBIT THE ABILITY OF NEW NETWORKS, SUCH AS INSP, TO DISSEMINATE THEIR PROGRAMMING

INSP's interest in this proceeding is clear. The Act's must carry requirements have already caused and, if not overturned, will continue to cause irreparable harm to INSP. Since the time that Congress enacted the 1992 Cable Act, cable systems serving over *half a million subscribers* have already discontinued carriage of INSP's signal due solely to the requirements imposed on such systems by the must carry rules. Those requirements compel most cable operators to reserve a substantial portion of their cable channels for the signals of certain local

television stations.[3] Since a cable system has only a finite number of channels on which it can provide programming, reserving a percentage of those channels for the signals of local broadcasters necessarily restricts the ability of non-broadcast programmers to obtain cable carriage, by limiting the cable operator's ability to offer program services to subscribers that it determines will best serve the needs and interests of those subscribers. A cable operator's obligation to satisfy the Act's must carry requirements therefore restricts the operator's editorial discretion to add the signals of cable networks to its system.

This situation can be devastating for a new or developing cable network, such as INSP. Such a network's only viable manner of distributing its programming, and thereby surviving in the video marketplace, is to persuade cable operators to carry its signal. Any cable network's plans for creating programming, hiring employees, and continuing its existence as a communications medium are based on the expectation that the network will be able to persuade cable operators to provide the network's signal to subscribers. This expectation exists without regard to the method by which the network obtains its operating funds, whether through advertising sales, license fees from cable operators, donations from cable subscribers, or other methods. If the network is unable to obtain widespread carriage on cable systems, the network's voice will be stilled.

The must carry rules' impact on new and developing cable networks is therefore even more immediate and

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[3] The number of channels that must be reserved for local television stations depends primarily on the size of the television market and the channel capacity of the cable system. Moreover, a television station that qualifies for must carry status has the option to forego its must carry rights and elect instead to negotiate for carriage. Where a television station has elected for negotiated carriage, cable systems located within the station's local service area must have obtained the station's signed "retransmission consent" in order to carry the station's signal after October 6, 1993. *See*, 1992 Cable Act, § 6, 106 Stat. 1482-1483.

dramatic than their effect on more established cable programmers. Established programmers are legitimately concerned about cable operators' willingness to carry their signals, given the broadcast station carriage obligations imposed on operators by the must carry rules. At least, however, those networks have established widespread cable carriage and subscriber loyalty. When cable systems must, by law, devote a large portion of their channel capacity to the carriage of local broadcast stations, the systems are far more reluctant to carry cable networks with less established subscriber loyalty and operating history. A lack of cable carriage severely hinders these newer networks in their efforts to establish such loyalty and operating history. Therefore, a newer network's inability to obtain carriage due to must carry obligations may preclude the network from ever having the opportunity to present its programming to the public in a meaningful manner.

Having launched a major new programming effort as recently as 1990, INSP's future is placed in immediate jeopardy by the must carry rules. Prior to the passage of the Act, INSP found cable operators receptive to the concept of adding INSP to their program lineups. As a result, INSP experienced consistent viewership growth. However, beginning with the period shortly before the Act was enacted, and continuing since that time, there has been an unmistakable change in the willingness of cable operators even to consider carrying INSP, due solely to the reimposition of must carry rules.

In the *amicus* brief that INSP filed with the District Court in this proceeding, INSP supplied irrefutable proof that the must carry rules had already begun to impair INSP's ability to provide its programming to viewers. INSP provided the District Court with affidavits, executed by two of INSP's Regional Managers of Affiliate Relations, detailing numerous examples of how the must carry rules had caused cable operators to terminate, or severely

restrict, any contemplation of carrying INSP's programming in both large and small cable systems in all parts of the country.

Now that the Federal Communiactions Commission (the "Commission") has adopted must carry rules and those rules have actually gone into effect, the rules' impact on INSP has become even more pronounced. As Attachment A hereto, INSP has furnished a sampling of the letters it has received from cable operators providing notice that the must carry rules have compelled those systems to add programming of local broadcast stations, and to discontinue carrying INSP, often despite the preferences of cable operators and subscribers. Those letters state that:

1. "I appreciate your willingness to communicate your concerns and offer alternatives as we cope with the many decisions associated with the new must-carry rules in Jacksonville. . . . It is still our plan to discontinue carriage of the network on or about June 2, 1993." (Continental Cable of Jacksonville)

2. "We are required to add two local broadcast stations in each system to comply with the must-carry provisions of the 1992 Cable Act. Multivision will no longer carry INSP after June 1, 1993 on either system because of limited channel capacity. . . ." (MultiVision Cable TV)

3. "After reviewing our line-up, we have decided to remove the New Inspirational Network to make room for [a] must-carry station. Rest assured, this was not an easy decision, but one that had to be made to comply with the new regulations." (Paragon Cable)

4. "Please be advised that in order to comply with Federal "Must Carry" regulations, Comcast will cease transmission of the Inspirational Network in North Little Rock, Arkansas, effective July 1, 1993." (Comcast)

5. "[D]ue to retransmission and must carry responsibilities created by the 1992 Cable Act, effective 11 18 93, [we] will no longer carry the Inspirational Network." (Liberty Cable)

These letters are representative of the reactions that INSP's managers have heard from cable operators since the Act's passage. Now that the must carry provisions have become effective, preventing cable operators from adding INSP's programming, INSP's growth has been halted and its ability to present programs that provide needed programming diversity and viewer choice is severely limited. Indeed, its very existence as a programming "voice" has been placed in jeopardy.

II. THE DISTRICT COURT MINIMIZED THE SUBSTANTIAL FIRST AMENDMENT ISSUES INVOLVED BY REGARDING MUST CARRY AS MERELY "ECONOMIC REGULATION"

The essential history of must carry rules is one of governmental action designed to allay broadcast television stations' fear of competition from cable television. Until the advent of cable television, broadcast television enjoyed over two decades as the medium with the sole technology for providing video programming directly to the home. However, since the early 1960s, broadcasters have confronted the competitive threat posed by cable television, a medium that provides video programming using wires rather than the over-the-air broadcast spectrum.

The earliest efforts of the Commission to regulate cable television responded to broadcasters' fears of competition from cable by granting certain licenses to cable operators only if they could demonstrate that their cable systems would have no direct or indirect effect on the continued survival of local television stations. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962), *aff'd sub nom. Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). As the Court of Appeals recognized:

> "Since the mid 1960's, when the nascent cable television industry began to loom as a threat to ordinary broadcast television, the Federal Communications Commission has labored to protect the local broadcast media through regulation of the cable industry." [4]

The must carry rules can best be understood as another method by which Congress and the Commission have tried to minimize this perceived threat to broadcasters. "Must-carry rules in various forms have been major tools in this campaign to protect local broadcasting from cable," the Court of Appeals observed. *Century*, 835 F.2d at 294. Must carry rules provide a mechanism under which broadcasters can ensure that their signals are carried on cable systems. Accordingly, such rules not only diminish the marketplace threat broadcasters perceive from cable television, but also ensure that cable television systems will have to support the competitive position of broadcast television stations by giving them access to cable system channels in a manner that serves to exclude, by operation of law, cable networks that may be better able to provide desirable uses of such channels for the delivery of programming.

Twice, the Commission adopted versions of must carry rules at the urging of television broadcasters.[5] Twice, the D.C. Circuit struck down those rules as unconstitutional infringements on free speech.[6] Now, broadcasters have

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[4] *Century Communications Corp. v. FCC*, 835 F.2d 292, 293 (D.C. Cir. 1987), *cert. denied sub nom. Office of Communication of United Church of Christ v. FCC*, 486 U.S. 1032 (1988).

[5] *Cable Television Report and Order*, 36 F.C.C.2d 143, *recons.* 36 F.C.C.2d 316 (1972), *aff'd sub nom. ACLU v. FCC*, 523, F.2d 1344 (9th Cir. 1975); *Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 (1986), *recons. denied* 2 FCC Rcd 3593 (1987).

[6] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v.*

found a sympathetic ear in Congress, which responded by enacting must carry into law in Sections 4 and 5 of the Act. The Commission responded by adopting yet a third version of must carry rules.[7]

However, the must carry requirements mandated by the Act suffer from the same constitutional infirmities as their administrative ancestors. Given the inherently intrusive nature of must carry rules on the speech of cable programmers, such as INSP, and cable operators, any possible version of such rules would necessarily suffer from the same infirmities.

A. Any Must Carry Requirements Directly and Unavoidably Inhibit First Amendment Rights

The primary error of the District Court's decision was its conclusion that the Cable Act's must carry provisions are "essentially economic regulation . . . justified by the existing structure of the cable business itself. . . . *Turner*, 819 F. Supp. at 40. Relying on that conclusion, the District Court all but ignored the inherent content-related nature of must carry requirements and the impermissible burden that such requirements place on the First Amendment rights of cable operators and cable programmers.

Although the District Court acknowledged that it was "too well established to reconsider" Supreme Court precedent confirming that cable television regulation implicates First Amendment issues,[8] the District Court proceeded as if such precedent was irrelevant to its legal analysis. Before even commencing its inquiry, the District Court announced its conclusion that the 1992 Cable Act:

Quincy Cable TV, Inc., 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC, supra.*

[7] *Implementation of the Cable Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965 (1993).

[8] *Turner*, 819 F. Supp. at 41, citing *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 1442-1443 (1991).

> "is simply industry-specific antitrust and fair trade practice regulatory legislation: to the extent First Amendment speech is affected at all, it is simply a byproduct of the fact that video signals have no other function than to convey information. . . . So perceived, the Court concludes that the must-carry provisions are, in intent as well as form, unrelated (in all but the most recondite sense) to the content of any messages that these embattled cable operators, broadcasters, and programmers have in contemplation to deliver."

Turner, 819 F. Supp. at 41. The remainder of the District Court's decision developed a rationale to justify its conclusion, effectively minimizing the significance of any First Amendment issues raised by the 1992 Cable Act's must carry provisions.

However, as with the First Amendment implications of cable television in general, the First Amendment impact of must carry is not open to question. In both the *Quincy* and *Century* decisions, the U.S. Court of Appeals struck down previous versions of must carry rules as unconstitutional infringements on free speech. Although those cases did not determine the precise standard of First Amendment review applicable to must carry, the Court of Appeals left no question but that must carry rules directly impact First Amendment issues. The *Quincy* court explained:

> "The [must carry] rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the community it serves. The difficulty is not so much that the rules force operators to act as a mouthpiece for ideological perspectives they do not share, *see Wooley v. Maynard*, 430 U.S. 705, 714 (1977), although such a result is by no means implausible. [Footnote omitted]. The more certain injury stems from the substantial limitations the rules work on the operator's otherwise broad dis-

cretion to select the programming it offers to subscribers. *See Miami Herald Co. v. Tornillo* [418 U.S. 241 (1974)]."

Quincy, 768 F.2d at 1452. *See also Century*, 835 F.2d at 304 (finding must carry rules unconstitutional, since the government must provide either empirical support or sound reasoning "when trenching on first amendment interests, even incidentally. . . ."). Since the *Quincy* and *Century* courts established that must carry implicates First Amendment interests and warrants the heightened legal analysis guaranteed of all restraints implicating First Amendment protections, the District Court improperly ignored applicable precedent in concluding that the Act's must carry provisions are merely "economic regulation . . . unrelated . . . to the content" of speech.

B. Must Carry Should Be Evaluated, and Invalidated, Using a "Strict Scrutiny" Standard

The District Court found "strict scrutiny" to be the incorrect test for assessing the constitutionality of must carry. However, must carry should be evaluated under the strict scrutiny standard, since such requirements favor one class of speakers over another based on the content of speech. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (the "concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment"). Under a strict scrutiny standard, the rules should be invalidated as an infringement on the First Amendment rights of cable programmers, such as INSP, and cable operators.

The District Court based its conclusion on an unduly narrow reading of Supreme Court decisions invalidating regulations affecting the content of speech. Pursuant to the District Court's understanding of the law, a regulation's constitutionality is subject to strict scrutiny analysis only where the regulation "tell[s] the speaker *what* to say or at least what to talk about." *Turner*, 819 F. Supp. at

42 (emphasis in original). However, as another U.S. District Court recently observed in a similar context:

> "a statute that directly abridges the right to engage in . . . speech must be evaluated under the heightened standards that have evolved under the Supreme Court's First Amendment decisions. This is true even when the abridgment is an incidental effect of a statute directed at non-speech activity, such as 'structural' economic regulation, if such a statute disproportionately impacts entities engaged in speech protected by the First Amendment. *See, e.g., Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986)."

Chesapeake and Potomac Telephone Company of Virginia v. United States, 1993 U.S. Dist. LEXIS 11822, *13 (E.D. Va. August 24, 1993) (finding the Communications Act's cable-telephone cross-ownership prohibition, 47 U.S.C. § 533(b), to be an unconstitutional abridgement of First Amendment rights).

Resting its analysis on the concept that must carry is only an economic regulation, the *Turner* Court wholly ignored precedent establishing that the Supreme Court looks to the *effect* of a regulation, not only to the *intent* of the regulators, in determining whether a regulation should be struck down as being content-based. In each of the last two terms, the Supreme Court has invalidated statutes having a direct impact on speech without regard to whether such an impact was intended by the statutes' drafters. As the Court recently explained, "just last Term we expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993) (invalidating ordinance prohibiting distribution of "commercial handbills" on public property), citing *Simon & Schuster, Inc. v. New York State Crime Victims Board*, 112 S. Ct. 501 (1991).

Contrary to the District Court's conclusion, must carry rules have a direct and unavoidable impact on speech.

Before enactment of the Act's must carry provisions, cable operators could choose to carry INSP, if they and their subscribers thought INSP provided a valuable service; since the Act's passage, that choice has been limited by government fiat. One reason for the District Court's misunderstanding of this impact was that its analysis virtually ignored the effect that must carry has on cable *programmers*, as opposed to cable *operators*. INSP's experiences of being dropped from cable systems serving half a million subscribers, and its difficulty in obtaining carriage on any new systems,[9] demonstrate how must carry rules have operated directly to inhibit INSP's speech by limiting the discretion of cable operators to determine whether they would rather carry the signal of a cable programmer or a local broadcast station.

Moreover, as discussed above, the *Quincy* court established the linkage between must carry rules and content, explaining:

> "Although not intended to suppress or protect any particular viewpoint, the rules are explicitly designed to 'favor[] certain classes of speakers over others' [citation omitted]. Their very purpose is to bolster the fortunes of local broadcasters even if the inevitable consequence of implementing that goal is to create an overwhelming competitive advantage over cable programmers. . . .
>
> Viewed from the perspective of the cable operator, the entity that delivers a preselected package of channels to paying subscribers, the must-carry rules are equally intrusive. The rules coerce speech; they require the operator to carry the signals of local broadcasters regardless of their content and irrespective of whether the operator considers them appropriate programming for the comunity it serves."

Quincy, 768 F.2d at 1451-1452.

Judge Williams' opinion in *Turner* also recognized that the District Court had little discretion to decide otherwise.

[9] *See* discussion on pages 4-8, *supra*.

since must carry rules are "content based under controlling precedent." *Turner*, 819 F. Supp. at 59 (Williams, J., dissenting). Following the precedent established by the *Quincy* court, Judge Williams found that must carry is inherently related to content, since the Act's must carry provisions:

> "extend the privilege of access only to a special class of unaffiliated programmers—local commercial and noncommercial television stations. Congress rested its decision to promote these stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate.' [citation omitted] . . . In other words, by virtue of provisions of law outside of the 1992 Act, the term used by the Act to define the benefitted class *automatically* entails content requirements.

Id. at 58 (Williams, J., dissenting) (emphasis in original).[10]

Furthermore, contrary to the District Court's view, the Supreme Court takes a broad view as to whether a regulation in fact tells a speaker what to say. For example, in *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 795 (1988), the Court struck down a North Carolina law requiring professional fundraisers to disclose certain information to potential donors. The Court held the law to be a content-based regulation of speech, explaining that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech. . . ." Similarly, the Court in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), found a Florida statute compelling a newspaper to print an editorial reply to be content-based, even though the statute did

[10] Although Congress's reasons for bypassing the Court of Appeals in the instant proceeding are unclear from the Act's legislative history, *see, e.g.*, Committee of Conference, H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. at 98 (1992), it is indisputable that the District Court remains bound by the precedent the Court of Appeals established in *Quincy* and *Century*.

not go so far as to tell a speaker what he or she could or could not say. Since must carry rules mandate speech and treat speech differently based on the nature of the expressive activity (*i.e.* speech emanating from local broadcast stations as opposed to from non-broadcast cable programmers), must carry regulations are content-based under applicable Supreme Court precedent.

Regardless of the justification proffered for must carry rules, regardless of whether those rules allow a cable operator some limited flexibility to select programming for its cable system, and regardless of whether the rules are adopted by the Commission or by Congress, any must carry rules:

> "profoundly affect values that lie near the heart of the First Amendment. They favor one group of speakers over another. They severely impinge on editorial discretion. And, most importantly . . . the rules prevent cable programmers from reaching their intended audience even if that result directly contravenes the preferences of cable subscribers."

Quincy, 468 F.2d at 1453. Because the Act's must carry provisions favor one class of speakers over another and have far more than an incidental effect on freedom of speech, the appropriate standard for evaluating their constitutionality is the strict scrutiny standard. Applying this degree of scrutiny to the newly-enacted must carry rules, they cannot stand. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992) ("content-based regulations are presumptively invalid"); *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 540 (1980) (government action restricting First Amendment rights can be sustained only if it is "a precisely drawn means of serving a compelling state interest"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1977) (government must show a subordinating interest which is compelling).

C. Even If Considered Under the *O'Brien* Test, the Must Carry Rules Still Cannot Pass Constitutional Muster

In the event that the Court chooses to evaluate the Act's must carry requirements using the balancing test of *United States v. O'Brien*, 391 U.S. 367 (1968) rather than the strict scrutiny standard, those requirements still remain unconstitutional on First Amendment grounds, for reasons similar to those enunciated in the *Quincy* and *Century* decisions.

In *Quincy*, as discussed above, the Court of Appeals invalidated the must carry rules finding they could not satisfy even the relatively lenient *O'Brien* standards. The *Quincy* Court said that the Commission had never proven the assumptions underlying its asserted rationale for imposing must carry rules, *Quincy*, 768 F.2d at 1457. Moreover, the Court of Appeals found that the rules were not sufficiently tailored to meet any perceived need and represented a "fatally overbroad response to the perceived fear that cable will displace broadcast television." *Id.* at 1459.

In *Century*, the Court of Appeals' most recent opportunity to address must carry, that Court found simi'ar infirmities in the Commission's second attempt at crafting a must carry rule. The *Century* court found that the rules failed the *O'Brien* test, since the Commission's judgment of the need for such rules had been based "not upon substantial evidence but rather upon several highly dubious assertions. . . ." *Century*, 835 F.2d at 300. In addition, the Commission had not shown that the means it chose to meet this need were congruent with the desired end. Not only were the rules adopted by the Commission broader than needed to achieve its asserted goa's, the *Century* Court said, but the Commission also had failed to consider adequately alternatives to those rules that might have done less damage to First Amendment rights. *Id.* at 304.

1. *Congress Has Not Proven, Nor Could It Have Proven, a "Substantial" Government Interest in Reimposing Must Carry Rules*

The must carry provisions Congress adopted in the Act, like their administrative predecessors, cannot satisfy even the *O'Brien* test. The Act's current must carry provisions are once again based on dubious assumptions that have never been adequately proven and that have in fact recently been disproven. The *Century* Court's criticism of the previous must carry rules applies here with equal force: "The need for a new saga of must-carry rules is more speculative than real. . . . Such speculative fears alone have never been held sufficient to justify trenching on first amendment liberties." *Century*, 835 F.2d at 300.

Expressing extreme deference to Congress,[11] the District Court declined to consider any evidence questioning the validity of Congress' assumptions that must carry requirements were in fact needed. However, the reasons that Congress asserted for adopting new rules demonstrate that those rules are primarily protectionist in nature, protecting broadcasters at the expense of the free speech rights of cable operators, cable programmers, and most severely, new and developing cable networks.

Throughout the Act's legislative history, Congress asserted that must carry rules were needed to help broadcast television to survive trying economic times and to protect broadcasters from cable operators' alleged tendencies to drop broadcast signals for anti-competitive purposes. As the Conference Committee proclaimed:

> "Given the current economic condition of free, local over-the air broadcasting, an affirmative must-carry

[11] "It is not the province of this Court to pass judgment upon the wisdom of the policies the national legislature has chosen to pursue in such endeavors." *Turner*, 819 F. Supp. at 48.

> requirement is the only effective mechanism to promote the overall public interest." [12]

This reference to the "public interest" is a strained one, suggesting that the public interest amounts to no more than the perceived need for local broadcasters to have a guaranteed profit. All of the other harms that Congress found would be caused by its failure to reimpose must carry rules, such as depriving television viewers of the benefits of universally available local television service or limiting the widespread availability of information from diverse sources, *id.* at 63, flow from the central premise that broadcasters need to be protected from cable operators.

Holding aside the questionable government interest in protecting one industry against another or granting access to one type of speaker to the detriment of another, the very premise of the government's argument is faulty: most cable operators continue to carry the signals of most local broadcast stations, nor are they even inclined, in the absence of must carry rules, to drop such signals in the future. The Act itself recognizes that broadcast programming "remains the most popular programming on cable systems" [13] and Congress confirmed in the Act's legislative history that "most cable systems have continued to carry a number of local over-the-air signals." [14] Congress' findings are consistent with the behavior patterns of cable operators found by the Commission itself.[15] The

[12] Committee of Conference, H.R. Conf. Rep. No. 102-862 at 75. *See also* House Comm. on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. at 51-52 (1992) (listing the financial harms caused to broadcasters by not being carried on, or having their signals repositioned by, cable systems).

[13] 1992 Cable Act, § 2(a)(19), 106 Stat. 1462.

[14] House Comm. on Energy and Commerce, H.R. Rep. No. 102-628 at 67.

[15] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Report*, Sept. 1, 1988, at 11, 13.

Court of Appeals similarly determined that in the 16 months that elapsed between the time of *Quincy* and the Commission's second attempt to impose must carry rules, "cable companies generally did not drop the local broadcast signals that they had been carrying." *Century*, 835 F.2d at 303.[16]

The significant number of television broadcasters that recently chose to forego their must carry rights, and opted instead to seek carriage pursuant to negotiated "retransmission consent" agreements, proves that broadcasters have concluded that they do not need to rely on must carry rules to ensure carriage on cable systems. According to reports in broadcast trade publications, a substantial number, and perhaps a majority, of television stations, affirmatively *declined* to exercise their must carry rights, electing retransmission consent as permitted by the Act.[17] The inescapable conclusion is that contrary to Congress'

[16] Despite the broadcast parties' attempts to justify the need for must carry rules in the District Court proceeding, those parties themselves conceded that the primary mode of cable systems remained that of distributing the signals of television broadcast stations. *See* "Public Broadcasters' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction and in Support of Public Broadcasters' Motion to Dismiss" at 52 ("In their original and still-preeminent distribution function, cable operators retransmit the signals of broadcast stations."); "Association of Independent Television Stations, Inc.'s Memorandum of Points and Authorities in Support of its Motion for Summary Judgment" at 2, 22 ("Cable television originated as a means of carrying broadcast signals and still functions largely in that role.").

[17] *See, e.g.*, Maddox, "Stations Cast Their Cable Vote," *Electronic Media*, June 21, 1993, at 1, 63 ("a majority of the group owners contacted . . . said they would go for retransmission consent"); "Putting a Price on Free TV," *Broadcasting and Cable*, June 21, 1993, at 7, ("[a]s expected, most commercial stations . . . took the retransmission consent route"); "Broadcasters Opting for Retrans," *Broadcasting and Cable*, June 21, 1993, at 8 ("NAB President Eddie Fritts predicted that 'a substantial number' of broadcasters would opt for retransmission consent rather than seek must carry").

belief that must carry is essential to prevent cable systems from dropping the signals of broadcast stations, broadcasters themselves disagree and deem that they have sufficient market power to ensure their stations' continued carriage.

Moreover, the experience of those broadcasters that elected retransmission consent further proves the point: when presented with the opportunity to refuse carriage to local broadcast stations seeking carriage pursuant to retransmission consent, *almost no* cable operators exercised their prerogative to refuse such carriage.[18] Accordingly, Congress was incorrect in concluding that certain marketplace factors existed that, absent must carry rules, would lead cable operators to discontinue carrying broadcast stations.[19] To the contrary, given the existence of a free market, most cable operators want to and intend to continue carrying local broadcast signals. As Judge Williams recognized in his dissenting opinion, "[s]o long as local broadcast programs continue to be so popular, it appears that cable simply cannot afford to drop broad-

[18] *See, e.g.*, "October 6 Retransmission Consent Disruptions Minimized by Agreements," *Communications Daily*, October 6, 1993, at 1 ("Expected 'massive disruptions' caused by loss of retransmission consent today . . . apparently aren't going to occur"); "Some Heated Retransmission Consent Skirmishes Emerge, But Most Are Settled," *Communications Daily*, October 7, 1993, at 1 (estimating that "at least 95% of cable subscribers saw no disruption at all, and . . . some cases where stations were dropped . . . were likely to settle by today"); Moss, "October 6 Was No Doomsday," *Multichannel News*, October 11, 1993, at 14. Indeed, the issue in retransmission consent negotiations became whether cable operators would *pay* broadcasters to carry their signals, rather than whether cable operators would refuse to carry the broadcasters' signals. *See, e.g.*, Flint, "Stations Stay for No Pay," *Broadcasting and Cable*, October 11, 1993, at 6 ("only a handful of stations continued to insist on cash, withholding permission from systems to carry their signals").

[19] *See, e.g.*, Committee of Conference, H.R. Conf. Rep. No. 102-862, at 75.

cast channels to any significant degree." *Turner*, 819 F. Supp. at 64 (Williams, J., dissenting).

Nor does the suggested government interest in fostering localism satisfy the *O'Brien* test. Congress' assertion that must carry rules are needed to ensure the availability of local news and information programming [20] impermissibly fails to consider cable systems' provision of such programming directly to subscribers, even without relying on the programming provided by television broadcast stations. Many cable systems produce their own local newscasts for carriage on local origination channels. In at least two television markets, Washington, D.C. and Long Island, New York, cable-only channels provide continuous 24-hour local news coverage. Many cable systems also present live coverage of local government meetings and hearings, bulletin boards providing information about local activities and community meetings, and independently-produced public access programming providing coverage of local events.

Accordingly, any Congressional interest in preserving the provision of local news and information should look not only to the local news and information that may be provided by local broadcast television stations, but also to the provision of such programming by cable systems. Even in the absence of must carry rules, local news and information programming will usually be available to cable subscribers as a result of the programming efforts of the cable operator and other non-broadcast users of the cable system.

Furthermore, to the extent that broadcast stations were not carried by cable operators prior to the reimposition of must carry, such stations were generally either: (a) low power television stations; or (b) new or developing full-power television stations garnering only small viewership

[20] *See, e.g.*, House Comm. on Energy and Commerce, H.R. Rep. No. 102-628 at 50, 53.

or transmitting from the fringes of metropolitan areas, providing only marginal signals to the majority of local residents. Under the must carry rules, however, many such full power stations and some low power television stations are entitled to cable carriage, despite the fact that the programming offered by INSP, or by some other non-broadcast source, may better meet the needs and interests of cable subscribers.[21]

The perceived problems leading to the adoption of the Act's must carry provisions simply do not exist on a scale sufficient to rise to the level of a "substantial" government interest.[22] Contrary to the fears that broadcasters have expressed since the earliest days of the cable industry,[23] broadcast signals remain an integral part of the service offered by cable systems. Cable subscribers expect that cable operators will carry the signals of most local broadcast stations and cable operators willingly comply with that expectation. In the absence of must carry rules, those local television stations providing valuable programming to cable viewers will continue to be carried by cable systems.

[21] *See, e.g., Implementation of Section 4(g) of the Cable Consumer Protection Act of 1992*, 8 FCC Rcd 5321 (1993) (*"Home Shopping Decision"*) (extending must carry rights to television stations providing "home shopping" services and Dissenting Statement of Commissioner Duggan questioning whether such stations serve the public interest).

[22] Indeed, any argument that the government's interest in reimposing must carry rules is sufficiently "substantial" to satisfy the *O'Brien* test is undercut by the existence of the retransmission consent provisions of the Act. If Congress' interest in reimposing must carry were truly to ensure that the public retained access to the diverse, local programming that broadcasters may provide, it would not have granted broadcasters the right to opt out of must carry in return for exercising a right to consent to carriage. The existence of the Act's retransmission consent provision further confirms that the must carry provisions were intended to serve broadcasters' private interests rather than any substantial government interest.

[23] *See* discussion on pages 8-9, *supra*.

Furthermore, despite Congress' apparent interest in the availability of diverse sources of information, it has simply ignored the vast diversity of programming already offered by many cable networks, and potentially offered by new cable networks, whose futures are imperiled by must carry rules. Congress used the term "diversity" as if it applies only to the programming provided by television broadcasters.[24] However, the diversity provided to cable subscribers must also be considered to include the wide array of news, public affairs, inspirational, documentary, sports, music, and children's programming, to name just a few, provided by most cable systems over non-broadcast cable networks. Whatever "diversity" may be added to the video marketplace by ensuring the survival of broadcast stations through must carry rules must be balanced against the loss of such diversity by stifling the development of new and developing cable networks that, like INSP, offer their own unique cable programming.

2. Assuming That Congress' Concerns Are Substantial, Must Carry Rules Remain an Inadequate Means of Addressing Those Concerns

If, for the sake of argument, the protectionist nature of must carry rules is disregarded, and Congress' purpose in reimposing must carry were deemed to be the promotion of competition and assurance of the availability of information from diverse sources, Congress has still chosen a method of advancing those interests that may achieve precisely the opposite results. If so, the must carry rules must fall under the final prong of the *O'Brien* test, requiring the least intrusive means of satisfying the governmental interest, even to the extent that the application of the *O'Brien* test to the must carry rules has been modified by *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) and *United States v. Albertini*, 472 U.S. 675, 689 (1985) (upholding a neutral regulation promoting a substantial

[24] *See, e.g.* House Comm. on Energy and Commerce, H.R. Rep. No. 102-628 at 51, 64.

government interest that would be achieved less effectively absent the regulation).[25]

The District Court was excessively and unnecessarily deferential to Congress in refusing to examine any evidence indicating that, in adopting must carry requirements, Congress may have chosen an ineffective method by which to accomplish its goals. The District Court stated simply that it was "unwilling to second-guess Congress' determination that the must-carry provisions are necessary to accomplish its objective." *Turner*, 819 F. Supp. at 47. However, the District Court should not have deemed its authority to be so limited as to preclude any questions concerning Congress' conclusion that must carry was the correct remedy for the perceived ill. This Court has frequently examined, and invalidated, Acts of Congress as infringements on free speech, when those Acts inadequately furthered Congress' goals. *See FCC v. League of Women Voters of California*, 468 U.S. 364 (1984). As another District Court recently explained:

> "It cannot be law that, whenever Congress passes a statute infringing on the right to free expression, it will be inferred by the reviewing courts that Congress considered and rejected the effectiveness of all less restrictive alternatives. Such a proposition would reduce the 'narrowly tailored' prong of the *O'Brien* test to a nullity. Rather, [a] court must undertake its own review of the record to determine whether Congress 'reasonab'y could have' found that [the law] was necessary to effectively accomplish Congress' purposes. *See San Francisco Arts & Athletics,*

[25] Television broadcasters who would obtain a government-mandated right to cable carriage under the must carry rules already have access to the public through their broadcast transmissions. Broadcasters' First Amendment right to speak is not affected by the lack of must carry rules, since even in the absence of cable carriage, such broadcasters already have a licensed transmission method available for their use. By contrast, INSP, like most cable networks, relies primarily on cable television channels to reach the public.

Inc. v. United States Olympic Committee, 483 U.S. 522, 539 (1977)."

Chesapeake and Potomac Telephone Company of Virginia, 1993 U.S. Dist. LEXIS at *27.

Initially, had the District Court undertaken such a review of the record, it would have found numerous alternatives to reimposing must carry rules that would have more effectively, and less intrusively, served Congress' goals. *See, e.g., Turner*, 819 F. Supp. at 57 (Williams, J., dissenting) (suggesting use of the Communications Act's leased access provisions, 47 U.S.C. § 532, as an "easy remedy, entirely consistent with the First Amendment"); *Century*, 835 F.2d at 304, n.6 (questioning whether the Commission "was correct to dismiss peremptorily the less restrictive alternatives to must-carry rules proposed during rulemaking").

Furthermore, had the District Court considered the issue, it would have found that re-imposing must carry has in fact *frustrated* Congress' goals of increasing competition by reducing the marketplace incentive for broadcasters to produce and carry quality programming. This is the case because in the absence of must carry obligations, broadcasters know that they must offer quality programming that viewers will want to watch in order to ensure the carriage of their stations on local cable systems. Broadcasters motivated to obtain cable carriage in such an environment are likely to ensure this result by improving their programming, differentiating their programming from the programming offered by other broadcasters in the market and by cable programmers, or offering a stronger over-the-air signal.

These incentives develop as a result not only of the competition among broadcasters, but also as a result of the competition between broadcasters and cable programmers such as INSP. INSP strives to provide programming that is distinctive in its quality as well as its diversity. In the absence of must carry, INSP, local broadcasters, and

other video programmers have had similar marketplace incentives to provide a mix of quality programming that cable viewers cannot obtain from any other source.

However, since broadcasters know they must be carried pursuant to the must carry rules, the desire to assure themselves of cable carriage no longer serves as an incentive for such stations to improve their product. Such broadcasters could provide programming for which there is limited public demand, transmit an over-the-air signal of only marginal quality, or offer only minimal service to the public, but would still know that their chances of success in the market would be substantially enhanced through cable carriage.[26] By contrast, in a video market without must carry, broadcasters whose programming does not attract large audiences are motivated to program for different market segments and thus to enhance both the diversity and the quality of programming available to television viewers.

In short, contrary to the assertions of Congress that must carry rules are needed to encourage competition, reimposing must carry rules has actually lessened competition and its attendant diversity benefits. Rather than relying on must carry rules, Congress could have ensured that diverse programming will be developed and transmitted to the public by encouraging competition between broadcast stations and cable programmers.[27]

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[26] Indeed, this result may already be occurring, in light of the Commission's recent decision assuring must carry rights to television stations providing so-called "home shopping" services, whose programming consists almost exclusively of program-length commercials and shopping pitches. *Home Shopping Decision, supra.*

[27] In addition, as demonstrated by the recent round of negotiations between cable operators and broadcasters who opted for carriage pursuant to retransmission consent, broadcasters and cable programmers who compete for cable carriage in a world without must carry often agree to other mutually beneficial arrangements with the cable operator, such as providing programming and marketing support and jointly sponsoring community events. INSP

CONCLUSION

As discussed herein, the efforts of newer cable networks such as INSP to bring quality programming to viewers have been severely undermined by the 1992 Cable Act's must carry provisions. Accordingly, The New Inspirational Network and The Inspirational Network, Inc. herein urge the Court to REVERSE the decision in *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32 (D.D.C. 1993) and to FIND UNCONSTITUTIONAL the must carry provisions of the Cable Television Consumer Protection and Competition Act of 1992.

Respectfully submitted,

JAMES S. BLITZ *
ROBERTS & ECKARD, P.C.
1919 Pennsylvania Avenue, N.W.
Suite 222
Washington, D.C. 20006
(202) 296-0533
Counsel for Amicus Curiae

* Counsel of Record

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offers such benefits to cable operators, and intends to continue to offer such benefits, but broadcasters may have less motivation to do so absent a market-based incentive to obtain carriage on a cable system.

APPENDIX

APPENDIX

Letters from cable operators announcing that their cable systems must discontinue carriage of The New Inspirational Network due to the imposition of must carry requirements.

1. Letter from Continental Cablevision of Jacksonville, May 21, 1993
2. Letter from MultiVision Cable TV, April 20, 1993
3. Letter from Paragon Cable, June 16, 1993
4. Letter from Comcast Cable Communications, Inc., June 30, 1993
5. Letter from Liberty Cable, October 18, 1993

[LOGO]

CONTINENTAL CABLEVISION OF JACKSONVILLE
P.O. Box 17613-F • 5934 Richard Street
Jacksonville, Florida 32245-7613 • (904) 731-8810

May 21, 1993

Mr. Bill McCall
Manager
Southeast Affiliate Relations
The Inspirational Network
9700 Southern Pine Blvd.
Charlotte, NC 28273

Dear Bill:

Thanks very much for your letter and visit with George Thorry this past week. I appreciate your willingness to communicate your concerns and offer alternatives as we cope with the many decisions associated with the new must-carry rules in Jacksonville. I'm sure you can understand the uncomfortable environment we face as we try to allocate scarce resources, and continue to grow our business in a sea of regulatory restraints.

It is still our plan to discontinue carriage of the network on or about June 2, 1993. To reiterate a point that George made during his meeting with you, we want to keep the door open to any ideas you might share on how we can provide an effective package of quality inspirational programming to our customers.

Thanks again for visiting with us.

Sincerely,

/s/ W. Scott Westerman
W. SCOTT WESTERMAN
Vice President District Manager
Continental Cablevision of Jacksonville

[LOGO]

MULTIVISION

April 20, 1993

Mr. Tim Himmelwright
The New Inspirational Network
9700 Southern Pine Blvd
Charlotte, NC 28273

Dear Tim,

MultiVision Cable TV currently carries INSP part time on its Lanham, MD system and full time on its Leesburg, VA system. We are required to add two local broadcast stations in each system to comply with the must-carry provisions of the 1992 Cable Act. Channel 66 WTKK from Manassas, VA must be added in both systems. WTKK carries many of the same programs that INSP carries.

MultiVision will no longer carry INSP after June 1, 1993 on either system because of limited channel capacity and the duplication of programming with WTKK. I appreciate the support you have given to MultiVision and the cable industry, and I regret that we will no longer be an affiliate of INSP.

As you requested, I have enclosed a copy of INSP's May schedule. The hours within the blocks are when INSP is carried in Lanham. The highlighted programs are also carried on WTKK, WDCA, or WFTY. A copy of the program schedule for WTKK is also enclosed.

Sincerely,

MULTIVISION CABLE TV

/s/ David A. Wilson
DAVID A. WILSON
Vice President and Regional General Manager

Enclosure

MultiVision Cable TV
9609 Annapolis Road
Lanham, MD 20706
Tel: (301) 306-5700
FAX: (301) 731-7822

[Logo]

PARAGON
CABLE

2600 McCormick Drive, Suite 255
Clearwater, Florida 34619 813/791-7730

June 16, 1993

Bill McCall
The New Inspirational Network
9700 Southern Pine Blvd.
Charlotte, NC 28273

Dear Bill:

In order to satisfy our must-carry requirements on our Lakeland and Haines City cable systems, we need to remove a cable satellite service. The station being added will go on the system on 7/1/93.

After reviewing our line-up we have decided to remove the New Inspirational Network to make room for this must-carry station.

Rest assured, this was not an easy decision, but one that had to be made to comply with the new regulations. Feel free to call me with any questions or concerns.

Best Regards,

/s/ Anthony L. Marino
ANTHONY L. MARINO
Vice President
Marketing & Programming
TAMPA BAY DIVISION

ALM:dp

Comcast Cable
Communications, Inc.
1234 Market Street
Philadelphia, PA 19107-3723
215 665-1700

[Logo]

COMCAST

June 30, 1993

Mr. Jim Dickson
The New Inspirational Network
6860 S. Yosemite Court
Suite 200
Englewood, CO 80112

Dear Jim:

Please be advised that in order to comply with Federal "Must Carry" regulations, Comcast will cease transmission of the Inspirational Network in North Little Rock, Arkansas effective July 1, 1993.

Thank you in advance for your understanding in this matter. If you have any questions or concerns, please do not hesitate to contact me at (215) 981-7704.

Very truly yours,

/s Ellen M. Stone
Ellen M. Stone
Programming Manager

EMS pmh

cc: M. Young
G. Colvin
M. Wilson

[Logo]

LIBERTY
CABLE

Liberty Cable
3125 Firestone Boulevard
South Gate, California 90280

(213) 566-3991
(818) 443-4133

October 18, 1993

Fernando Gomez
Manager, Affiliate Relations
Inspirational Network
1888 Century Park East
19th Floor
Los Angeles, CA 90067

Dear Fernando:

This correspondence shall serve as official notice that due to retransmission and must carry responsibilities created by the 1992 Cable Act, effective 11 18 93, Consolidated Signal Corporation (d.b.a. Liberty Cable) will no longer carry the Inspirational Network.

As a cable network programmer you can appreciate the new awesome responsibilities caused by the 1992 Cable Act. We, as many of our industry counterparts, are doing our very best to meet these new challenges head on.

We appreciate the Inspirational Channel's past spirit of cooperating and support.

Sincerely,

s/ Michael A. Green
MICHAEL A. GREEN
President
Chief Operating Officer

cc: Matt Davis
Mike Beller
File